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State v. Passons Appellant's Brief Dckt. 41288

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. RUSSELL PASSONS, Defendant-Appellant.	NO. 41288 KOOTENAI CO. NO. CR 2012-11152 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Rules

Statutes

STATEMENT OF THE CASE

Nature of the Case

In what his trial counsel described as a "petty theft case that's been blown way out of proportion," Russell Passons took a baby stroller out of a Walmart store in Post Falls and placed it in his car. He immediately went back into the store, placed a TV in a shopping cart, and took it outside without paying. This time, however, he was seen by two Walmart employees who followed Mr. Passons outside and confronted him. The two employees claimed Mr. Passons pulled out a knife and threatened them, prior to running to his car and driving off. Mr. Passons was charged with burglary and two counts of aggravated assault enhanced by the use of a deadly weapon, and with being a persistent violator of the law. Rather than deciding the case based solely on the evidence of what transpired on the day of the alleged theft, jurors heard that Mr. Passons was a repeat offender, who committed other crimes the next day, and that he was a suspect in a robbery.

The jury ultimately found Mr. Passons guilty of burglary and both aggravated assault counts and the district court found that he used a deadly weapon during the commission of the assaults, but found that the State failed to prove that he was subject to the persistent violator enhancement. Mr. Passons timely appealed from his Judgment and Sentence and asserts that the district court erred in allowing the State to present evidence that he attempted to exchange purportedly stolen items and was involved in a high speed chase the next day and, in denying his motions for mistrial, and that the accumulation of errors deprive him of his right to a fair trial.

Statement of the Facts and Course of Proceedings

Russell Passons was charged by Information with two counts of aggravated assault and one count of burglary[1]. (R., pp.54-56.) Part II of the Information alleged that he used a deadly weapon (a knife) while committing the alleged aggravated assaults, and Part III alleged that he was persistent violator of the law. *Id.* Prior to trial, the State filed two notices, pursuant to I.R.E. 403(b), of its intent to introduce evidence that Mr. Passons and another attempted to return a stolen baby stroller to the Walmart in Ponderay the day after the alleged theft, and he fled from Sandpoint and Ponderay police, and that he possessed a knife and stolen Walmart merchandise when he was apprehended. (Augmentation: Notice of Intent to Produce 404(b) Evidence (filed 10/19/12); Notice of Intent to Produce 404(b) Evidence (filed 1/22/13).)[2] Mr. Passons filed a written objection to the State's proffered 404(b) evidence arguing that all of the information regarding what allegedly occurred the next day, including his alleged attempt to return stolen items to a different Walmart, the subsequent police chase, his car crashing, and a pipe being found in his car, were not relevant, and that any purported relevance was outweighed by the prejudicial impact of the information. (R., pp.132-135.) The defense asserted,

> The indisputable fact is that the incident in Sandpoint will only introduce unsubstantiated claims of attempting to sell stolen property, drugs, and one substantiated claim of eluding.[3] Nothing about eluding the police in

[1] The Information alleged that Mr. Passons entered the Post Falls Walmart "with the intent to commit the crime of theft and/or aggravated assault and/or robbery ...." (R., p.55.) However, at the conclusion of the State's case, the district court granted Mr. Passons' motion to strike the "and/or aggravated assault and/or robbery" language. (Tr., p.251, L.25 – p.254, L.6.)

[2] A Motion to Augment the Record with these items has been filed contemporaneously with this brief.

[3] Mr. Passons pled guilty to a misdemeanor eluding charge in Bonner County stemming from the incident in Sandpoint. (R., pp.25-26.)

> Sandpoint will provide the jury with any relevant information as to what did or did not take place in Post Falls the day before.

(R., p.134.)

Due to the court's schedule, pre-trial motions, including the dispute over the proffered 404(b) evidence, were heard after the jury was selected. (Tr., p.85, L.14 – p.141, L.18.) Noting that the State's burglary allegation surrounded Mr. Passons entering the Walmart allegedly with the intent to steal the TV, defense counsel argued that none of the information surrounding what transpired on the day after (the attempt to exchange the baby stroller, the flight from law enforcement, and the pipe found in the car) was relevant to the crimes Mr. Passons was alleged to have committed the day before, and would lead the jury to convict on the basis of Mr. Passons' character. (Tr., p.116, L.6 – p.118, L.24.)

The State responded first by arguing that it expected the evidence to show that Mr. Passons first took the baby stroller without paying for it, then re-entered the store, took the TV and walked out again without paying for it, where he was confronted by the two employees leading to the aggravated assault charges. (Tr., p.119, Ls.13-21.) The State then asserted that it wanted to put on evidence that on the next day, Mr. Passons met with a woman that he befriended; she attempted to return the baby stroller to the Ponderay Walmart but she was unable to do so; employees recognized Mr. Passons, who was also in the store, from a report generated the previous day and called the police; a pursuit occurred; Mr. Passons was apprehended; and, the stroller that was stolen the previous day was found in his car. (Tr., p.119, L.22 – p.120, L.13.) The State asserted that this information was admissible as evidence of flight relevant to consciousness of guilt, "evidence of a common scheme or plan that he stole the baby stroller from the Post Falls [Walmart] and then attempted to return it," and that it

corroborates the theft inside the Walmart the previous day. (Tr., p.120, Ls.11-23.) The State offered to limit the prejudice of the evidence by having only one officer testify about the pursuit and only one Walmart employee testify about the attempted return of the stroller. (Tr., p.120, L.23 – p.121, L.15.) Defense counsel responded that the proffered evidence had little probative value and that any value was outweighed by its prejudicial impact. (Tr., p.123, L.13 – p.125, L.12.)

The district court found, "I'm not sure that what the state is offering here about what took place up in Sandpoint is really so much a common scheme or plan as much as it is just simply a continuation of the actual criminal conduct that is alleged in the information." (Tr., p.134, Ls.1-5.) The court held that in order to prove Mr. Passons committed the alleged burglary, the state must establish both an intent to commit the crime of theft when he entered the store and, if something was removed from the store, the intent to permanently deprive the owner of that property "to prove that there was a theft." (Tr., p.134, Ls.6-16.) The Court found that Mr. Passons' alleged attempt to return the stolen baby stroller would support a finding that he had the intent to commit the crime of theft when he entered into the store the second time, on the previous day. (Tr., p.136, Ls.2-16.) The court found that,

> the state certainly has the obligation to prove the burglary charge by showing these intents, and that would be indicative of the evidence that they have in Standpoint in terms of what Mr. Passons allegedly did with the property in Sandpoint. And so that qualifies both as evidence of motive as well as, more particularly, intent which certainly comes under an exception under 404(b) analysis.

(Tr., p.136, Ls.17-24.) The court found Mr. Passons' attempt to return the evidence in Sandpoint, his subsequent flight, and his possession of the baby stroller were relevant to his alleged motive and intent[4] (Tr., p.136, L.25 – p.138, L.24.)

During *voir dire*, the court asked the jury panel, "do any of you know any reason why you feel you cannot sit as a fair and impartial juror in this action?" (R., p.16, Ls.13-15.) Ms. Cook, a potential juror, then had the following exchange with the court:

> The Court: How are things this morning?
>
> Ms. Cook: Pretty good, other than this is kind of embarrassing to say, but if he's a defendant, I work in a bar. He's already covered in tattoos. He's been in and out of jail more than I can count. Those aren't normal tattoos that people just get for decoration. I've already formed an opinion of him. I honestly don't think I can give him a fair trial.
>
> The Court: Well, I don't know that I agree with your conclusions, but that's not important. I appreciate you offering that and you being –
>
> Ms. Cook: I know about the difference between decorative and –
>
> The Court: That's quite all right. Thank you very much Ms. Cook. Why don't you go ahead and step down and I will excuse you.

(Tr., p.19, L.20 – p.20, L.10.) Defense counsel immediately asked the court if the parties could approach and a side bar was held. (Tr., p.20, Ls.11-13.)

After conducting the rest of voir dire but prior to the parties exercising their peremptory challenges, the court took up various defense challenges to the venire panel. (Tr., p.67, L.3 – p.85, L.9.) The court noted that Mr. Passons timely moved for a mistrial during the side bar conducted after Ms. Cook stated she was biased because

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[4] The court also held that evidence that a pipe was found in Mr. Passons' car was not admissible, and the court initially held that, provided the State could lay the proper foundation, evidence of a knife being present during the incidents occurring in Sandpoint would be admissible. (Tr., p.136, L.25 – p.138, L.24.) However, the State ultimately conceded that no knife was found and that information regarding the knife, allegedly seen thrown from Mr. Passons' vehicle during the chase, was too vague and the prosecutor would not present any such evidence. (Tr., p.143, L.3 – p.145, L.7.)

Mr. Passons' tattoos demonstrated that he had been in and out of jail. (Tr., p.76, Ls.6-17.) Defense counsel asked the court to declare a mistrial based upon Ms. Cook's tainting the jury with her purported expertise, based upon her experience as a bartender, that Mr. Passons' tattoos demonstrate that he is a "con" who had been repeatedly incarcerated. (Tr., p.77, L.18 – p.80, L.10.)

In ruling on the motion for mistrial, the district court noted that Mr. Passons has "rather a large star tattoo on ... on the upper right side of his forehead," and visible tattoos on his neck underneath his chin and on his hands that would have been visible to the juror. (Tr., p.82, L.17 – p.83, L.14.) The court recognized that Ms. Cook's statements were "a little bit more of a concern" than other situations where prospective jurors state that they cannot be unbiased, "because this juror has articulated an opinion about what those tattoos mean"; however, the court ultimately concluded that the comments were not so extreme as to warrant a mistrial, and the court denied Mr. Passons' motion. (Tr., p.83, L.15 – p.85, L.7.)

The State's first witness was Matthew Erlandson, an asset protection associate at the Post-Falls Walmart, who testified that on June 21st, 2012, he saw Mr. Passons load a 37-inch Vizio television into a shopping cart. (Tr., p.160, L.23 – p.166, L.25.) Mr. Erlandson testified that after Mr. Passons had gone into the bicycle aisle for two or three minutes, he pushed the shopping cart with the TV in it past the registers and out the general merchandise doors. (Tr., p.167, L.1 – p.168, L.21.) Mr. Erlandson and his co-worker Mr. Killian, followed Mr. Passons to about 20 feet outside, stopped Mr. Passons from pushing the cart further, and identified themselves. (Tr., p.168, L.22 – p.169, L.5.) Mr. Passons then said, "'I ain't stopping for shit. Fuck you. You can't touch me.'" (Tr., p.169, Ls.6-9.) According to Mr. Erlandson, Mr. Passons pulled out a

folding knife from his right front pocket near the location of his keys, which were attached to his belt via a bandoleer, and opened the blade. (Tr., p.169, L.10 – p.170, L.8.) Mr. Erlandson testified that he was very scared as he was five feet away from Mr. Passons, who was angry and pointed the knife at him for about two seconds, before running away and putting the knife back in his pocket. (Tr., p.170, L.9 – p.172, L.7.) Mr. Erlandson called police dispatch while he and Mr. Killian followed Mr. Passons to his car, where they saw the box for a baby stroller that Walmart sells in the back of the car. (Tr., p.172, L.8 – p.175, L.23.) The TV was recovered although the shipping label and the UPC had been cut from the box. (Tr., p.187, Ls.7-17.)

Believing that Mr. Passons may have stolen the baby stroller, Mr. Erlandson reviewed security footage which revealed that Mr. Passons had indeed taken the baby stroller in the same manner that he attempted to take the TV, i.e., he placed the item in a shopping cart, went to the bike section for a few minutes, and then walked out the general merchandise doors without paying. (Tr., p.175, L.24 – p.181, L.10; *See also* Ex. 1.) The State presented the surveillance evidence via Exhibit 1, which contains 13 separate clips, taken from multiple cameras, generally showing Mr. Passons' actions in the store that day. (Tr., p.179, L.7 – p.186, L.9; Ex.1.) None of the 13 clips captured the confrontation with Mr. Passons outside the store, nor was Mr. Passons ever shown holding a knife. (Ex.1) Mr. Erlandson claimed that sunlight caused the cameras that would have shown the confrontation to record only a white light. (Tr., p.182, Ls.12-24.) No explanation was offered for why there was no footage of the time Mr. Passons allegedly spent in the bike section, where he allegedly cut the UPC and shipping label from the boxes. (*See generally* Tr.)

On cross-examination, Mr. Erlandson admitted that he never mentioned during his preliminary hearing testimony or in his written statement that Mr. Passons had keys dangling from a bandoleer near the pocket Mr. Passons allegedly pulled the knife from, despite being asked whether it was possible that what he thought was a knife was really his keys. (Tr., p.198, Ls.6-24.) Mr. Erlandson stated that he chose not to save the surveillance footage from the camera that would have captured Mr. Passons pulling the knife claiming that it was washed out by the sun. (Tr., p.196, Ls.9-17.) Mr. Erlandson admitted that Walmart's policy requires employees to disengage suspected shoplifters whenever the suspect displays a weapon. (Tr., p.200, Ls.3-18.)

Vincent Killian was also working as a Walmart asset protection associate and testified that he saw Mr. Passons leave the store without paying for the TV. (Tr., p.205, L.9 – p.208, L.10.) When they stopped him about 20 feet outside the store, he testified that Mr. Passons pulled out a knife and said, "'Fuck you. I ain't stopping for shit,'" and the two backed up. (Tr., p.208, Ls.11-25.) Mr. Killian claimed that he was about 3 feet away from Mr. Passons, who was very angry and pointed the knife at him for less than ten seconds. (Tr., p.209, Ls.1-20.) Despite feeling threatened and despite not having a weapon himself, Mr. Killian joined Mr. Erlandson in pursuing Mr. Passons in order to get a description and a license plate number, all while pushing the cart containing the TV. (Tr., p.209, L.21 – p.211, L.5.) He later found the UPC and the serial number that had been cut off from the TV box in the bicycle aisle. (Tr., p.211, Ls.6-21.) On cross-examination, Mr. Killian admitted that Walmart policy bars employees from following a fleeing shoplifting suspect after 10 feet and that they are to stand back if the suspect has a weapon. (Tr., p.212, L.11 – p.213, L.1.)

Timothy Patee, an asset protection manager at the Ponderay Walmart, testified that on June 22, 2012, he saw Mr. Passons, whom he recognized from a "BOLO" he received the day before from the Post Falls store, and a female companion that he did not recognize, walk out of the store, place a boxed baby stroller in Mr. Passons car, and drive away. (Tr., p.215, L.15 – p.220, L.14.). Mr. Patee called the police. (Tr., p.220, Ls.15-18.) Desiree Storck testified that she and her boyfriend met Mr. Passons for the first time that day, and she agreed to go into the Ponderay Walmart and attempt to return a baby stroller and a set of Legos while her boyfriend waited in the car, in exchange for a ride to another store. (Tr., p.226, L.2 – p.229, L.18.) Unable to return the items, Ms. Storck and Mr. Passons got back in the car and left in a hurry, police chased them for what she estimated was 20 to 25 minutes before Mr. Passons hit a curb and blew out his tire, and the three were removed from the car at gunpoint. (Tr., p.229, L.19 – p.232, L.5.)

Officer Teresa Heberer of the Sandpoint Police Department testified that she was on patrol duty on June 22, 2012, and became involved in the pursuit of a car. (Tr., p.232, L.23 – p.234, L.15.) The prosecutor asked, "[w]hy don't you describe what was going on rather than what someone said. What was going on during the pursuit?" (Tr., p.234, Ls.16-18.) Officer Heberer responded by stating, "[w]e were following a suspect from a robbery that occurred --" (R., p.234, Ls.19-20.) The court sustained a defense objection and, outside the presence of the jury, the defense moved for a mistrial arguing that the use of the term "robbery" was both inaccurate and inflammatory, noted that the testimony itself related to 404(b) issues, and asserted that it was misconduct for the prosecutor to solicit the information which deprived Mr. Passons his right to a fair trial. (Tr., p.234, L.21 – p.237, L.4.) The prosecutor

argued that he did not solicit information about an alleged robbery and that the court can eliminate any prejudice by instructing the jury that there was no robbery. (Tr., p.237, L.18 – p.238, L.20.) Defense counsel further argued cumulative error and asserted that this testimony was the "straw that broke the back." (Tr., p.238, L.22 – p.239, L.4.)

The district court found that the prosecutor's question did not solicite the response given; however, the court recognized that the statement was made by a law enforcement officer and was mindful of that fact. (Tr., p.239, L.5 – p.240, L.5.) The court, however, denied the motion for mistrial finding that the statement would not deprive Mr. Passons of a fair trial. (Tr., p.240, L.6 – p.241, L.5.) The court instructed the jury,

> I want to instruct you that there was no robbery. There has been no robbery charged, nor is Mr. Passons a suspect in a robbery at the relevant time in question here. So I just want to make sure the jury is very well aware of that.

(Tr., p.242, Ls.3-7.)

Officer Heberer testified that she was the third police car in the chase that lasted for about 7 minutes and ended when Mr. Passons' car hit a curb. (Tr., p.242, L.10 – p.244, L.25.) She got out of her police car with her gun drawn, and they eventually seized a baby stroller and a set of Legos. (Tr., p.245, L.1 – p.250, L.18.) Both the State and Mr. Passons rested. (Tr., p.251, L.6; p.256, Ls.21-22.)

The jury found Mr. Passons guilty of burglary, and of both counts of aggravated assault. (R., p.273; Tr., p.297, L.1 – p.302, L.1.) Mr. Passons waived his right to a jury trial on Parts II and III of the Information and the district court ultimately found that he had used a deadly weapon during the commission of the aggravated assaults (during an indivisible course of conduct); however, the court found that the State failed to

provide sufficient evidence that Mr. Passons had two or more prior felony convictions. (R., p.303; Tr., p.302, L.16 – p.340, L.6.) The Court ultimately sentenced Mr. Passons to a five year fixed-term on one aggravated assault count, a unified term of 20 years, with 10 years fixed, for the second aggravated assault count enhanced by the deadly weapon finding, and 10 years, with 5 years fixed, for the burglary conviction, with all sentences to run concurrently. (R., pp.313-318; Tr., p.342, L.3 – p.359, L.6.) Mr. Passons filed a timely Notice of Appeal. (R., pp.321-325.)

ISSUES

1. Did the district court abuse its discretion by allowing the State to present evidence of Mr. Passons' actions the day after the charged crimes?

2. Did the district court err in denying Mr. Passons' motions for mistrial as the jury hearing he was a repeat offender and a suspect in a robbery deprived him of his right to a fair trial?

3. Even if the errors are individually harmless, was Mr. Passon's Fourteenth Amendment right to due process of law violated because the accumulation of errors deprived him of his right to a fair trial?

ARGUMENT

I.

The District Court Abused Its Discretion By Allowing The State To Present Evidence Of Mr. Passons' Actions The Day After The Charged Crimes

A. Introduction

Mr. Passons was charged with burglary allegedly committed by entering the Walmart with the intent to steal a television. He objected to the State presenting evidence that he attempted to return a baby stroller the next day, and that he fled from the police after attempting to commit that crime. Mr. Passons asserts that the district court abused its discretion when it denied his objection to the State presenting this evidence as it was inadmissible character evidence and that any legitimate relevancy to this evidence was outweighed by its prejudicial impact. He further asserts that the State will be unable to prove the error was harmless beyond a reasonable doubt.

B. Relevant Jurisprudence

A court's decision to admit evidence is reviewed for an abuse of discretion. *State v. Grist*, 147 Idaho 49, 51 (2009). An appellate court reviewing a district court's discretionary decision engages in a three part analysis: First, whether the district court correctly perceived the issue as discretionary; second, whether the court acted within the outer bounds of its discretion and consistently with applicable legal standards; and third, whether the court reached is decision through an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600 (1989).

Evidence is relevant if it has any tendency to make the existence of any fact of consequence to the litigation more probable or less probable, and such evidence is generally admissible. I.R.E. 401, 402. However, evidence of a person's character trait

is generally not admissible to prove the person acted in conformity with that trait except in limited circumstances. I.R.E. 404(a). Additionally,

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident ....

I.R.E. 404(b). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." I.R.E. 403.

In deciding whether to admit evidence under I.R.E. 404(b), the district court must first determine whether there is sufficient evidence to establish that the alleged crime, wrong, or act actually occurred.[5] *Grist*, 147 Idaho at 52 (citations omitted). If so, the court must then determine whether the fact of the crime, wrong, or act would be relevant to a material and disputed issue, other than the defendant's character or criminal propensity. *Id.* (citations omitted). Finally, the court must determine whether the danger of unfair prejudice outweighs the probative value of the evidence. *Id.* (citations omitted).

[5] Mr. Passons acknowledges that there was sufficient evidence for the district court to find that on the day after the charged crimes he attempted to return the baby stroller to the Ponderay Walmart, with the assistance of another, and that he fled from the police.

C. The District Court Abused Its Discretion When It Admitted Evidence Of Mr. Passons' Next-Day Bad Acts As Such Evidence Was Inadmissible Character Evidence And Any Limited Probative Value Was Outweighed By Its Prejudicial Impact

1. The Burglary Charged Allegedly Occurred When Mr. Passons Reentered The Walwart With The Intent To Steal The Television

As a preliminary matter Mr. Passons recognizes that the charging language in the Information alleges only that he entered the Walmart "with the intent to commit the crime of theft"[6] without specifically stating what Mr. Passons intended to steal. (R., p.55.) However, the record reveals that the defense understood the charged conduct to relate to Mr. Passons' reentry into the Walmart after taking the baby stroller, presumably with the intent to steal the TV. (Tr., p.114, L.12 – p.116, L.16.) The prosecutor never disavowed this understanding and, in fact, argued to the jury that this understanding was correct. The prosecutor argued,

> The issue, and what you have to decide here, is whether he did so with the intent to commit the crime of theft. That's what it comes down to. So you have to look at the evidence that came in front of you the last couple of days and decide whether or not when he walked into that [Walmart] the second time, he had the intent to commit the crime of theft. And there are a couple of things that are helpful to look at in deciding whether or not when he walked in the second time.
>
> When I mean the second time, I'm talking about after he had stolen the stroller and put it in his car and went back into [Walmart] to get the TV.

(Tr., p.271, Ls.3-14.) In ruling on Mr. Passons' motion, the district court found that evidence that Mr. Passons took the baby stroller prior to reentering the store and taking the TV "would support the state's argument that the intent, at least on the second

[6] As noted in fn 1 *supra*, the district court found that the State presented no evidence that Mr. Passons entered with the intent to commit the crimes of aggravated assault and/or robbery and omitted that language in the burglary elements instruction. (R., p.260.)

occasion to enter the store, was to commit the theft based on what had occurred earlier."[7] (Tr., p.135, Ls.15-23.) Therefore, the parties and the court all recognized that Mr. Passons was not charged with any crimes related to the theft of the baby stroller.

2. Evidence That Mr. Passons Attempted To Exchange The Baby Stroller The Next Day At A Different Walmart, And That He Fled From Police When His Attempt Was Thwarted, Was Not Relevant To Any Disputed Fact

In order to prove that Mr. Passons committed the crime of burglary when he entered the Post Falls Walmart the second time, the State was required to prove that, at the moment he entered, he had the intent to commit the crime of theft. (R., pp.55, 260; *see also* I.C. § 18-1401.) However, the court found that the State had the additional obligation of proving that Mr. Passons' had the intent to permanently deprive the owner of the item(s) Mr. Passons intended to steal. (Tr., p.134, L.6 – p.135, L.2.) Based upon this reasoning, the court concluded,

> If [he] were to remove something without paying for it in [Post Falls] and then return it for a refund in [Ponderay], that certainly would support the state's position that there was an intent to, in fact, steal when the defendant entered the store for the second time to – and removed the television based upon the conduct that he took with respect to the stroller that he was able to actually remove from the store, apparently.

[7] Defense counsel asserted that the State failed to provide notice that it intended to present evidence that Mr. Passons stole the baby stroller and argued that such information should not be admitted on that basis. (Tr., p.115, L.14 – p.116, L.16.) The prosecutor acknowledged that he considered filing a 404(b) notice of the State's intent to present this evidence ultimately deciding not to, believing that a notice was not necessary as it was all part of the same alleged crime. (Tr., p.121, L.16 – p.122, L.4.) Mr. Passons concedes that information related to his taking the baby stroller without paying for it, prior to reentering and taking the TV without paying for it, was relevant to the issue of his intent, and further recognizes that no additional notice was necessary. *See State v. Sheldon*, 145 Idaho 225 (2008).

(Tr., p.136, Ls.8-16.) The Court found that the evidence was relevant to Mr. Passons' motive and intent. (Tr., p.136, L.17 – p.137, L.18.) The district court's reasoning is flawed.

The State was not required to prove that Mr. Passons actually committed a theft, only that he had the intent to do so when he entered the store. (R., pp.55, 260-261; *see also Matthews v. State*, 113 Idaho 83 (Ct. App. 1985).) The jury was so instructed. (R., p.261 (Instruction No. 22 (stating, in relevant part, "The State need only prove that when the defendant entered the store the defendant intended to steal anything inside that the defendant might desire to take.")).) Mr. Passons concedes that evidence that he entered the Walmart and took the baby stroller without paying for it, prior to re-entering the store and taking the TV without paying for it, was relevant to whether he had the intent to commit theft when he re-entered the store prior to taking the TV. Furthermore, had he been charged with burglary in connection with his taking the baby stroller, evidence that he attempted to exchange the stroller, presumably for money, at a different Walmart, may in fact be relevant to whether he had the intent to commit the crime of theft when he entered the store prior to stealing the baby stroller. However, Mr. Passons' next-day conduct involving the baby stroller – and item that was not the subject of any charged crimes – does not have a tendency to make any disputed fact – i.e., his intent upon entry prior to taking the TV – any more or less probable.

Furthermore, while evidence that Mr. Passons fled when his attempt to exchange the baby stroller was thwarted may be relevant to his consciousness of guilt in regard to his stealing the stroller (*see State v. Moore*, 131 Idaho 814 (1988)), this flight was not relevant to determine whether he had the intent to steal the TV when he entered the store the previous day. His prior day's flight has a tendency to demonstrate his intent to

commit the crime of theft when he re-entered the Walmart immediately preceding his taking the TV without paying for it. However, the TV had been recovered. There is nothing in the record to suggest that Mr. Passons had any reason to believe he would face charges for his failed attempt to steal the TV the prior day, especially in light of the fact that the police chase that actually occurred resulted from his attempt to exchange the baby stroller. Therefore, the district court erred in admitting evidence of Mr. Passons next-day actions as such evidence was irrelevant.

3. Even If There Is Some Relevance To Mr. Passons' Next-Day Attempt To Return The Baby Stroller And Subsequent Flight, Any Probative Value Was Substantially Outweighed By Its Prejudicial Impact

Assuming *arguendo* that Mr. Passons' next-day attempt to exchange the baby stroller and his subsequent flight from police was relevant to his intent when he entered the Walmart prior to taking the TV, any relevance was outweighed by its prejudicial impact. "[W]here proof of the commission of the charged offense carries with it the evident implication of a criminal intent, evidence of the perpetration of other like offenses or bad acts will not be admitted." *State v. Alsanea*, 138 Idaho 733, 740 (Ct. App. 2003) (citing *State v. Stoddard,* 105 Idaho 533, 537 (Ct.App.1983).

In *Alsanea*, the Idaho Court of Appeals rejected the State's argument that evidence of the defendant's prior acts of stalking and threatening his girlfriend were relevant to demonstrate the requisite intent of a defendant charged with two counts of aggravated assault on a law enforcement officer. *Id.* at 739-740. The Court held,

> There was ample evidence adduced at trial from which Alsanea's criminal intent could be determined. One of the officers involved in the aggravated assaults testified that, when he confronted Alsanea and ordered him to get down on the ground, Alsanea looked directly at him with a strong, determined look, like he was an "obstacle" to Alsanea. Both of the officers involved testified that Alsanea swept his jacket back with his elbow—which one officer described as a very distinct, unfriendly gesture—and

> pulled out his gun. Several witnesses, including the officers, testified that Alsanea aimed his gun at the officers after pulling it out of his waistband. Evidence of Alsanea's act of pulling a gun from his waistband and aiming it at the officers obviously implied his intent to threaten the officers. Accordingly, **because Alsanea's guilty intent could be established by proving that he pulled out his gun and pointed it at the officers, the testimony concerning Alsanea's prior bad acts was not necessary to prove his intent.**

Id. at 740 (emphasis added). The *Alsanea* Court relied upon a prior decision of the Court of Appeals holding that it was error, where the defendant was on trial for stealing a car, for the district court to allow in evidence that the defendant had stolen another car the week before. *Stoddard,* 105 Idaho at 537-538.

In the present case, the jurors could reasonably conclude that Mr. Passons had the intent to commit the crime of theft when he entered the Walmart prior to taking the TV, from the mere fact that he left the store without paying for the TV. Evidence that he had earlier taken the baby stroller without paying for it certainly adds to the legitimacy of this conclusion. However, Mr. Passons' next-day actions involving the baby stroller were additional bad acts, separate and apart from the allegation that he committed burglary the prior day. Evidence that Mr. Passons attempted to return the baby stroller, if relevant to his intent or motive at all, was overly prejudicial as it would lead jurors to render their decisions based upon evidence that Mr. Passons is a person of ill-character, generally intent on committing crimes, rather than on the evidence presented in connection with the crimes he was actually charged with.

Furthermore, even if Mr. Passons' next-day flight had some limited relevance to his intent upon entering the Walmart prior to taking the TV the day before, any relevance was substantially out-weighed by its prejudicial. Mr. Passons was alleged to have led multiple police cars on a chase through the city of Sandpoint, a chase that ended with his tire blowing out and he and his passengers being removed at gun-point.

(Tr., p.229, L.19 – p.232, L.5, p.242, L.10 – p.250, L.18.) As the Court of Appeals has observed, "Rule 403 does not offer protection against evidence that is merely prejudicial in the sense of being detrimental to the party's case. The rule protects against evidence that is unfairly prejudicial, that is, if it tends to suggest decision on an improper basis." *State v. Floyd*, 125 Idaho 651, 654 (Ct. App. 1994 (citation omitted)). Evidence that Mr. Passons was chased by multiple police officers and pulled from his car at gun-point tends to suggest to the jury that he is a person of ill-character, who should be convicted based upon this observation, rather than based on the evidence offered to support the actual charges filed. As such, the district court abused its discretion denying Mr. Passons' motion to exclude his next-day bad acts.

4. The State Will Be Unable To Prove The Error Is Harmless Beyond A Reasonable Doubt

Counsel for Mr. Passons timely objected to the district court allowing the State to present its proffered 404(b) evidence of Mr. Passons' conduct the day following the commission of the alleged crimes. As such, if this Court finds that the district court erred it this ruling, the State bears the burden to prove, beyond a reasonable doubt, the error was harmless under the standards articulated in *Chapman v. California*, 386 U.S. 18 (1967). *See State v. Perry*, 150 Idaho 209, 227 (2010). The Idaho Supreme Court has recognized,

> Under the *Chapman* harmless error analysis, where a constitutional violation occurs at trial, and is followed by a contemporaneous objection, a reversal is necessitated, *unless* the State proves "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."

State v. Almaraz, 154 Idaho 584, 598 (2013) (citing *State v. Perry,* 150 Idaho 209, 221 (2010) (in turn quoting *Chapman v. California,* 386 U.S. 18, 24 (1967)).) Indeed, the United States Supreme Court has held,

> The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.

Sullivan v. Louisiana, 508 U.S. 275, 279-80 (1993) (citing *Rose v. Clark,* 478 U.S. 570, 578 (1986); *Clark*, 478 U.S at 593 (BLACKMUN, J., dissenting); *Pope v. Illinois,* 481 U.S. 497, 509–510 (1987) (STEVENS, J., dissenting).) The State will be unable to meet its burden in this case.

Mr. Passons recognizes that the very reason he asserts that the next-day evidence should not have been admitted in this case is due to the strength of the prosecution's case without this evidence, i.e., there was sufficient evidence to prove that Mr. Passons had the requisite intent to steal the TV upon re-entering the Post Falls Walmart based upon his actions that day. Although Mr. Passons does not concede the State will be able to demonstrate that the erroneously admitted 404(b) evidence did not contribute to his burglary conviction, the more significant harmful contribution of this evidence was to the aggravated assault charges.

The State's aggravated assault charges depended entirely on the testimony of Matthew Erlandson and Vincent Killian, both of whom claimed that Mr. Passons pulled a knife on them when they stopped him from taking the TV. (Tr., p.169, L.10 – p.170, L.8; Tr., p.208, Ls.11-25.) However, their testimony is questionable considering the fact that, if Mr. Passons did pull a knife, their act of chasing him violated Walmart's policy requiring their employees to disengage from a shoplifting suspect whenever a weapon

is displayed. (Tr., p.196, Ls.9-17; Tr., p.212, L.11 – p.213, L.1.) Furthermore, Mr. Erlandson produced 13 different sections of security footage showing Mr. Passons from when he walked into the store prior to taking the car stroller, to when he fled from his pursuers and drove off. (*See* Exh. 1.) Notably missing, however, was any footage showing Mr. Passons cutting the boxes prior to leaving the store, and any footage of Mr. Erlandson and Mr. Killian confronting Mr. Passons outside the store where Mr. Passons allegedly pulled a knife. It would certainly be reasonable for jurors to be skeptical of Mr. Erlandson's explanation that his reason for erasing this footage was because it "white washed" by the sun. (Tr., p.196, Ls.9-17.)

Absent the evidence of his next-day activities, the jurors would have only been seen video footage showing Mr. Passons take the TV out of the store (after previously taking the baby stroller without paying for it and placing it in his car) and then run off when confronted by store security. The jurors would have had to evaluate Mr. Erlandson's and Mr. Killian's knife claim accordingly. However, upon learning that Mr. Passons attempted to engage in new criminal activity the next day ultimately necessitating the police removing him from his car at gun-point, the jury was given a very unflattering view of Mr. Passons' character, making the claim that he pulled a knife the previous day more likely based entirely upon this unflattering view. The State will be unable to prove that the erroneously admitted evidence of Mr. Passons actions the day following the crimes charged did not contribute to the jury finding him guilty of the aggravated assault charges.

II.

The District Court Erred In Denying Mr. Passons' Motions For Mistrial As The Jury Hearing He Was A Repeat Offender And A Suspect In A Robbery Deprived Him Of His Right To A Fair Trial

A. Introduction

Mr. Passons asserts that the district court erred when it denied each of his motions for mistrial, based first upon a potential juror's statement that he had "been in and out of jail more times than I can count" which was based upon her observation of the number and type of tattoos he had, and then upon a police officer volunteering that he was a suspect in a robbery.[8] Mr. Passons asserts that, when viewed in the context of the entire trial, these statements allowed the jurors to convict him based upon their perception that he is a person of ill character, rather than upon the evidence presented; thus, Mr. Passons was deprived his due process right to a fair trial.

B. Relevant Jurisprudence

Motions for a mistrial are governed by Idaho Criminal Rule 29.1. It states, in relevant part, "[a] mistrial may be declared upon motion of the defendant, when there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, which is prejudicial to the defendant and deprives the defendant of a fair trial." I.C.R. 29.1. The Fifth Amendment to the United States Constitution states that, "[n]o person shall be ... deprived of life, liberty, or property, without due

[8] Because the Idaho Supreme Court has reaffirmed its standard of review of a denial of a mistrial motion – i.e., reviewed in the context of the full record examining the "continuing impact on the trial" – subsequent to this Court's opinion in *State v. Perry*, 150 Idaho 209 (2010), establishing the standard of review for both preserved and un-objected to error (*see State v. Ellington*, 151 Idaho 53, 68 (quoting *State v. Field*, 144 Idaho 559, 571 (2007) as the standard of review)), Mr. Passons has combined the two motions and rulings into one appellate issue.

process of law." U.S. Const. amend. V. Similarly, the Fourteenth Amendment states, "[n]o state shall deprive any person of life, liberty, or property, without due process of law .... " U.S. Const. amend. XIV. Additionally, the Idaho Constitution also guarantees that, "[n]o person shall be ... deprived of life, liberty or property without due process of law." *Id.* Idaho Const. art. I, § 13. Due process requires criminal trials to be fundamentally fair. *Schwartzmiller v. Winters*, 99 Idaho 18, 19 (1978).

The standard of review when a district court denies a motion for a mistrial is well established.

> [T]he question on appeal is not whether the trial judge reasonably exercised his discretion in light of circumstances existing when the mistrial motion was made. Rather, the question must be whether the event which precipitated the motion for mistrial represented reversible error when viewed in the context of the full record. Thus, where a motion for mistrial has been denied in a criminal case, the "abuse of discretion" standard is a misnomer. The standard, more accurately stated, is one of reversible error. Our focus is upon the continuing impact on the trial of the incident that triggered the mistrial motion. The trial judge's refusal to declare a mistrial will be disturbed only if that incident, viewed retrospectively, constituted reversible error.

State v. Ellington, 151 Idaho 53, 68 (2011) (quoting *State v. Field*, 144 Idaho 559, 571(2007)).

C. The Jurors Were Provided With Information That Mr. Passons Had Been Repeatedly Incarcerated

When the potential jurors were asked by the district court if there was any reason why they could not be fair and impartial, Ms. Cook stated, "I work in a bar. He's already covered in tattoos. He's been in and out of jail more than I can count. Those aren't normal tattoos that people just get for decoration. I've already formed an opinion of him. I honestly don't think I can give him a fair trial." (Tr., p.16, Las.13-15, p.19, L.21 – p.2.) The district court attempted to limit the impact of Ms. Cook's observations by

expressing that it did not necessarily agree with her conclusions; however, Ms. Cook offered, "I know about the difference between decorative and ..." prior to being cut-off again by the district court, and being excused from the panel. (R., p.20, Ls.3-10.)

The district court recognized that Mr. Passons has "a rather large star tattoo on ... on the upper right side of his forehead," and visible tattoos on his neck underneath his chin and on his hands that would have been visible to the juror. (Tr., p.82, L.17 – p.83, L.14.) The Court also recognized that, rather than merely expressing an opinion that Mr. Passons must be guilty merely because he is charged with a crime or expressing a negative opinion about people who have tattoos in general, Ms. Cook described Mr. Passons' tattoos as being a result of his repeated prior incarcerations. (Tr., p.83, L.19 – p.84, L.13.) The court never instructed the jury to disregard Ms. Cook's recognition that Mr. Passons had been "in and out of jail" many times. Therefore, although Ms. Cook's statements were not admitted as evidence, her statements presented information that Mr. Passons had been repeatedly incarcerated and were not corrected by the district court.

D. The Jurors Were Provided Information That Mr. Passons Was A Suspect In A Robbery

Officer Teresa Heberer of the Sandpoint Police Department testified that she was on patrol duty on June 22, 2012, and became involved in the pursuit of a car. (Tr., p.232, L.23 – p.234, L.15.) The prosecutor asked, "[w]hy don't you describe what was going on rather than what someone said. What was going on during the pursuit?" (Tr., p.234, Ls.16-18.) Officer Heberer responded by stating, "[w]e were following a

suspect from a robbery that occurred --" (R., p.234, Ls.19-20.)[9] The court denied the defense motion for mistrial finding that the statement would not deprive Mr. Passons of a fair trial. (Tr., p.240, L.6 – p.241, L.5.) The court instructed the jury,

> I want to instruct you that there was no robbery. There has been no robbery charged, nor is Mr. Passons a suspect in a robbery at the relevant time in question here. So I just want to make sure the jury is very well aware of that.

(Tr., p.242, Ls.3-7.)

E. In The Context Of The Full Record, The Information That Mr. Passons Had Been Repeatedly Incarcerated, And Was The Subject Of A Robbery Investigation, Deprived Him Of His Right To A Fair Trial

Mr. Passons recognizes that the record does not demonstrate that any of the individual jurors who actually deliberated on his case were biased against him in the same way that Ms. Cook was biased against him. As noted by the court, after Ms. Cook was excused the remaining jurors were questioned about their ability to be impartial by the attorneys during the rest of *voir dire*, and those that could not were excused. (Tr., p.20, L.14 – p.70, L.12, p.76, L.6 – p.85, L.9.) As such, Mr. Passons does not assert that he was deprived his right to an *impartial* jury based solely on Ms. Cook's comments. *See State v. Ellington*, 151 Idaho 53, 69-70 (2011). Furthermore, Mr. Passons recognizes that the district court instructed the jury not to consider Officer Heberer's claim that he was the subject in a robbery investigation.

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[9] The Idaho Supreme Court has held that "when an officer of the State gives any unsolicited testimony that is gratuitous and prejudicial to the defendant, that testimony will be imputed to the State for the purposes of determining prosecutorial misconduct." *State v. Ellington*, 151 Idaho 53, 61 (2011). Mr. Passons does not raise a separate prosecutorial misconduct claim in this case recognizing that, unlike in *Ellingston*, the prosecutor attempted to solicit information that the district court had specifically ruled was admissible, rather than, as the prosecutor did in *Ellington*, "engage in this line of questioning ... that he clearly knew ... would create a high risk of an improper comment on Mr. Ellington's silence." *Id.*

> I want to instruct you that there was no robbery. There has been no robbery charged, nor is Mr. Passons a suspect in a robbery at the relevant time in question here. So I just want to make sure the jury is very well aware of that.

(Tr., p.242, Ls.3-7.) However, in the context of the full record, Ms. Cook's claim about Mr. Passons being, essentially, a repeat offender, and Officer Heberer's statement that he was the subject of a robbery investigation, deprived Mr. Passons of his right to a fair trial.

As noted in section I above, the district court allowed the jury to hear evidence of Mr. Passons' poor character based upon his actions in attempting to exchange the baby stroller and fleeing from police. Even if this Court were to find this evidence, in and of itself, was admissible, when combined with Ms. Cook's interpretation of the tattoos that all of the juror's could see, and Officer Heberer's testimony that Mr. Passons was the subject of a robbery investigation, the jurors were painted a picture that Mr. Passons was simply a criminal. The district court never instructed the jurors to disregard Ms. Cook's observations and the court's instruction that Mr. Passons was not "a *suspect at the relevant time* in question here," in essence, would lead the jurors to conclude that Mr. Passons was a repeat offender who *has been* a suspect in a robbery at some point in time. "An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence." *Bruton v. United States*, 391 U.S. 123, 131 fn.6 (1968) (citing *Blumenthal v. United States*, 332 U.S. 539, 559-560 (1947).) In the context of the entire trial, Mr. Passons asserts that he was denied his right to have jurors consider only relevant and competent evidence bearing on his guilt or innocence; thus, he was denied his due process right to a fair trial. As such, he asserts that the district court erred in denying his motions for mistrial.

III.

Even If The Errors Are Individually Harmless, Mr. Passon's Fourteenth Amendment Right To Due Process Of Law Was Violated Because The Accumulation Of Errors Deprived Him Of His Right To A Fair Trial

Mr. Passons asserts that if the Court finds that the above errors were individually harmless, the errors combined amount to cumulative error. "Under the doctrine of cumulative error, a series of errors, harmless in and of themselves, may in the aggregate show the absence of a fair trial. However, a necessary predicate to the application of the doctrine is a finding of more than one error." *Ellington*, 151 Idaho at 70 (citing *Perry,* 150 Idaho at 230).) For the reasons articulated in Sections I(C)(4) and II(E) above, Mr. Passons asserts that the accumulation of errors in this case deprived him of his right to a fair trial.

CONCLUSION

Mr. Passons respectfully requests that this Court vacate his convictions and remand his case to the district court for a new trial.

DATED this 7th day of April, 2014.

JASON C. PINTLER
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 7th day of April, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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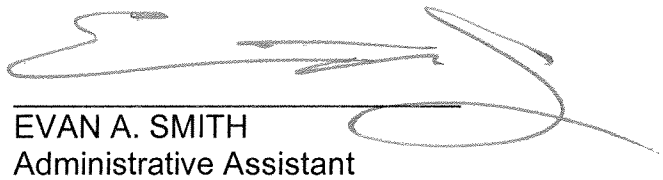

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